

In the Matter of the Compensation of
KIERA L. ERVIN, Claimant
WCB Case Nos. 21-01152, 21-00771, 21-00161
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Otto's order that set aside its denial of claimant's new or omitted medical condition claim for C4-5 disc herniation and right C6 nerve root contusion conditions. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

On review, the employer's argument references an Oregon Medical Board (OMB) decision involving claimant's treating surgeon that was not a part of the hearing record. The employer requests that the Board take administrative notice of the OMB decision. Claimant responds that the decision is not appropriate for administrative notice and moves to strike those portions of the employer's appellate briefs that reference the decision. For the following reasons, we agree with claimant's contentions.

Our review is limited to the record developed at the hearing. ORS 656.295(5); *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985). We may, however, take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *SAIF v. Calder*, 157 Or App 224, 227 (1989).

In previous cases, we have taken administrative notice of Board and Workers' Compensation Division (WCD) orders involving the same claimant. *See, e.g., Timothy C. Guild*, 68 Van Natta 741, 743 n 3 (2016) (Board may take administrative notice of agency orders involving the same claimant); *Brian M. Eggman*, 49 Van Natta 1835 (1997). Here, the OMB decision does not involve an agency order concerning the same claimant; rather, it is a medical board decision regarding a physician. Thus, we decline to take administrative notice of the OMB decision. Accordingly, we grant claimant's motion to strike references to the OMB decision in the employer's appellant's brief made at pages 29 through 31.

Moreover, even if we were to take administrative notice of the OMB's decision, it would not affect the outcome of this dispute. We adopt the ALJ's analysis of Dr. Brett's opinion in this case and an OMB's decision would not affect our conclusion that Dr. Brett offered a thorough, well-reasoned, and persuasive medical opinion in this case.¹

For the reasons expressed above, as well as those expressed in the ALJ's order, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find a reasonable fee for claimant's attorney's services on review is \$8,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, the value of the interests involved, the risk of claimant's counsel going uncompensated, and the contingent nature of the practice of workers' compensation law.

ORDER

The ALJ's order dated September 22, 2022, is affirmed. For services on review, claimant's counsel is awarded a \$8,000 assessed fee, payable by the employer.

Entered at Salem, Oregon on October 10, 2023

¹ Finally, to the extent the employer seeks remand for additional evidence taking under ORS 656.295(5), we do not find a compelling reason for remand. *See SAIF v. Avery*, 167 Or App 327, 333 (2000). Specifically, as explained above, additional evidence taking regarding the OMB decision is not reasonably likely to affect the outcome of the case. *Id.*